

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION**

In the Matter of the Application for a
Certificate of Need for the Hollydale 115kV
Transmission Line Project in the Cities of
Plymouth and Medina, Hennepin County

OAH: 8-2500-23147-2
MPUC: E-002, ET2/CN-12-113

OAH: 8-2500-22806-2
MPUC: E002/TL-11-152

In the Matter of the Application for a Route
Permit for the Hollydale 115 kV Transmission
Project in the Cities of Plymouth and Medina,
Hennepin County

**WESTERN PLYMOUTH NEIGHBORHOOD ALLIANCE COMMENTS ON
PETITION TO WITHDRAW APPLICATIONS**

INTRODUCTION

On December 10, 2013, Applicants filed a Petition to Withdraw Pending Certificate of Need and Route Permit Applications for the Hollydale transmission line. Western Plymouth Neighborhood Alliance (Alliance) requests that any such petition only be approved with prejudice, specifying that Applicants may not propose either a 115 kV line from the Medina Substation through the Hollydale Substation to an area near I-94 or a rebuild/upgrade of transmission along the currently inactive 69 kV transmission corridor in Plymouth and Medina.

The Alliance further requests that any acceptance of Applicants' petition for withdrawal include instructions that Xcel Energy meet distribution needs in the Plymouth area with low voltage feeder distribution facilities without further delay.

Finally, the Alliance expresses its concern that the hundreds of citizen comments in this record not be sacrificed in this process. Should Applicants return with any transmission proposal

through the Plymouth area, we request that public hearing transcripts and citizen comments in the Hollydale dockets be incorporated in any future record.

DISCUSSION

An administrative law judge has the authority to recommend dismissal where a case has become moot or for other reasons. Minn. R. 1400.5500(K), Minn. R. 1400.8606, subp. 3(I). However, no Minnesota statutes or rules specify the conditions under which a public utility may withdraw an application for a certificate of need or route permit in a contested case or the factors an administrative law judge should consider in recommending dismissal. The Alliance has identified no previous case before the Public Utilities Commission where an Applicant sought to withdraw its application for a certificate of need or route permit in the midst of a contested case.

Minnesota's rules and precedent in civil cases governing dismissal of a complaint are instructive. Where parties do not stipulate to the dismissal, a court order is required. Minn. R. Civ. P. 41.01(a). Where a court order is required, counterclaims must be preserved and the court may provide "such terms and conditions as the court deems proper." Minn. R. Civ. P. 41.01(b).

A party cannot use voluntary dismissal of a case without prejudice to circumvent statutory requirements for pursuing a claim. *Lombardo v. Seydow-Weber*, 529 N.W.2d 702 (Minn. Ct. App. 1995). *See also Pond Hollow Homeowners Ass'n v. Ryland Group*, 779 N.W.2d 920, 924 (Minn. Ct. App. 2010).

Moreover, where a case is failing on its merits, it is appropriate to deny plaintiff's motion to dismiss the case without prejudice and to summarily rule for the defense. *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409 (Minn. Ct. App. 1998). Minnesota policy on dismissal of actions is that "the right to dismiss without prejudice ought to be limited to a fairly short period after commencement of the action when prejudice to opponents is likely to be minimal." *Id.*, at 411.

Dismissal without prejudice unfairly denies opposing parties a defense where a plaintiff seeks dismissal due to the weakness of its case, *Id.*, at 412, citing *Grover v. Eli Lilly and Co.*, 33 F.3d 716, 719 (6th Cir. 1994) ("At the point when the law clearly dictates a result for the defendant, it is unfair to subject him to continued exposure to potential liability by dismissing the case without prejudice."); *Chodorow v. Roswick*, 160 F.R.D. 522, 524 (E.D. Penn. 1995) (when plaintiff's sole motive is his "realization that his case has been weakened by events and his corresponding hope that the passage of time will somehow improve things for him" the court should grant plaintiff's motion to dismiss with prejudice).

Dismissal with Prejudice

In this case, no settlement has been reached and intervenors do not stipulate to dismissal. Based on the record and consistent with Minnesota Session Laws of 2013, Chapter 57, Section 2 ("Hollydale law"), the Alliance has provided an affirmative alternative to the certificate of need application. Specifically, the Alliance has argued that the Applicants' studies, pre-filed expert testimony, public testimony from elected officials and hundreds of citizens, and the Department of Commerce Environmental Report demonstrate that underground low-voltage feeders and new substation facilities provide a feasible and available alternative to Applicants' transmission proposal. The Alliance and others have demonstrated the weaknesses of Applicants' applications and why the certificate of need must fail on its merits.

Applicants' petition to withdraw admits, "we now appreciate that our preferred route is very problematic," and "there may be better alternatives to meet that need." (App. Petition, p. 1). The petition tacitly acknowledges the likelihood that they would not be successful going forward with the contested case hearing. Accordingly, Applicants' withdrawal should be with prejudice.

Additionally, Applicants must not be permitted to use withdrawal to circumvent the

existing Hollydale law, which disfavors a transmission solution to local distribution needs in the Plymouth area. The law requires a certificate of need before a high voltage transmission line can be approved to rebuild approximately eight miles of a 69 kV transmission corridor and provides, “The certificate of need may be approved only if the commission finds by clear and convincing evidence that there is no feasible and available distribution level alternative to the transmission line.” Minn. Session Laws 2013, Ch. 57, Sec. 2(a). The Alliance is concerned that Applicants’ withdrawal of applications for a certificate of need and route permit without prejudice would indeed circumvent statutory requirements and deprive intervenors of a defense to Applicants’ proposals on which they are prevailing on the merits.

Applicants have stated in their petition to withdraw that they believe the Hollydale law would not apply to the new applications they intend to file. (App. Petition, p. 2) Yet while Applicants have stated, “we fully intend to comply with the intention of the law,” they have nonetheless characterized the law’s intent as something that would be met “by carrying forward in our new Certificate of Need application all the system alternatives, including distribution alternatives, which were developed during this proceeding.” (App. Petition, p. 2).

The legislators who authored the Hollydale law have testified, though, that the intention of the law was to disfavor a high voltage transmission line and that the Applicants “alternatives” that impose a 115 kV transmission line on distribution alternatives are inconsistent with both the letter and spirit of the law. Carrying these high voltage transmission line alternatives forward again would not “comply with the intention” of the Hollydale law, but defeat its purpose.

The Alliance believes that a dismissal must be with prejudice to prevent an end run around the Hollydale law and misuse of process when a contested case is failing on its merits. The Alliance requests that the terms for dismissal with prejudice preclude the following:

- Any 115 kV transmission project from the Medina Substation through the Hollydale Substation to an area in Plymouth near I-94; and
- Any rebuild or upgrade of the existing inactive 69 kV corridor through Plymouth and Medina for transmission infrastructure.

Meeting Distribution Level Needs

In addition to opposing new transmission in Plymouth and Medina, the Alliance has supported distribution alternative A2, consisting of approximately 19 miles of underground 13.8 kV feeder lines and new substation facilities.

Applicants' petition suggests that they will delay implementation of a distribution alternative, while continuing to press for high voltage transmission. Applicants state, "We have concluded that our original preferred route is not widely supported, meaning additional analysis and outreach is needed before we can present a more acceptable route alternative," (App. Petition, p. 2-3), "After this public outreach and broader acceptance of a solution is complete, we intend to seek the necessary regulatory approvals which we believe, at this time, would involve submitting new Certificate of Need and Route Permit applications." (*Id.*, p. 2), if the application is withdrawn, "we will have time to develop a new solution." (*Id.*, p. 3)

The Alliance believes that no further "outreach" or "new solution" is necessary. There is broad public support to meet distribution level needs in the Plymouth area with a distribution scale alternative, such as alternative A2. Applicants' plan for extended public "outreach" will only serve to elevate concerns about brownouts and impaired reliability and to deny the community the underground feeder solution that they have already affirmatively proposed. Further delay in implementing distribution improvements would hold the community hostage to approve yet another transmission line proposed by Applicants.

In addition to denying the applications with prejudice, the Alliance requests that

Applicants be directed to meet the distribution needs of the Plymouth area by implementing alternative A2 or a comparable alternative consisting of underground low-voltage feeders and substation facilities. Compliance filings should be required to demonstrate their progress.

Preservation of Public Record

Applicants' recognize that citizens opposing their transmission proposals "have already invested significant time and effort in the hearings, meetings, and filings that have already taken place in these dockets." (App. Petition, p. 3) The cruelest irony would be if the very investment and efficacy of opposition would result in the loss of the record created, without ever reaching a final report in this hotly contested case. Applicants could then come before a new administrative law judge and Commission and claim that they have a clean slate.

A contested case record is usually maintained until issuance of an administrative law judge's final report. *See* Minn. R. 1400.8609, subp. 1. Where withdrawal of petitions prevents such final ruling on the merits, the Alliance suggests in the interest of justice that the record be retained and incorporated by reference should Applicants seek to construct or rebuild transmission through the Plymouth and Medina communities.

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Respectfully submitted,



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